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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Pronounced on: 18.05.2018

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O.M.P. (T) (COMM.) 66/2017 and IA No. 9706/2017

ASHIANA INFRAHOMES PVT LTD & ORS Petitioner

Through Jai Sahai Endlaw, Adv.

versus

ADANI POWER LTD

..... Respondent

Through

Mr. Parvez Bashista and Mr. Munesh
Kumar, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present petition is filed under section 14(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the act”) seeking to terminate the mandate of the learned Arbitrator on the ground that he has become *de jure* unable to perform his functions to act as an Arbitrator.
2. The case of the petitioners is that sometimes in 2010 the respondent intended to set up an Earthing Station on approximately 70 acres of contiguous land in village Thana, Tehsil Tehwa, District Kurukshetra, Haryana. For the said purpose it is averred that the respondent engaged the petitioner company for the purpose of aggregating land from the land owners/farmers/sellers. Parties entered into a Memorandum of Agreement dated 20.11.2010. Clause 10 of the Agreement provided that in the eventuality of disputes the resolution of the same would be through arbitration.

3. Clause 10 of the Agreement reads as follows:-

“10.Dispute Resolution

Any dispute or differences relating to or in connection with the MoA shall be referred to the sole Arbitrator Mr. Puneet Saran son of Prem Vallabh Saran r/o F 22 Indraprastha CGHS Plot 114, Patparganj New Delhi, whose decision shall be final and binding on the Parties. The proceedings of Arbitration shall be in Gurgaon in accordance with the provisions of the Arbitration & Conciliation Act 1996 as amended up-to date."

4. Though the full details are not provided but it appears that on account of disputes having arisen between the parties the named Arbitrator Shri Puneet Saran was appointed as the Sole Arbitrator.

5. It is the case of the petitioner that the said learned Sole Arbitrator is working as a consultant and an employee of the respondent company and was to verify claims that were to be submitted by the petitioners in terms of the clause 8(c) of the agreement dated 10.11.2010. He is also on the board of a connected company of the respondent i.e. Delhi Golf Links Properties Pvt. Ltd. It is hence urged by the petitioners that in terms of the arbitration clause which provides that the provisions of the "Arbitration and Conciliation Act, 1996 as amended upto date" would be applicable, the amendments in the Act of 2015 would be applicable and the learned Arbitrator being an employee of the respondent is *de jure* unable to perform his functions and his mandate is liable to be terminated.

6. The petitioners point out that in view of the above position the petitioner filed an application under section 12(3) of the Act before the learned Arbitrator. However, the said application was dismissed by the learned Arbitrator on 20.11.2014. In the said order the learned Arbitrator has

noted that since the beginning, as the President in the Group of Companies he has been looking into the corporate affairs of the company. He denied that he looks after the daily affairs of any individual company or supervised the dealings between the petitioners and the respondent. Thereafter the petitioners also moved an additional application under section 14 of the Act before the learned Arbitrator. The said application has also been dismissed on 28.7.2017.

7. I have heard learned counsel for the parties. Learned counsel for the parties have also filed their written submissions where their respective contentions have been stated.

8. Learned counsel for the petitioners has strongly pleaded as follows:-

(i) That in terms of Section 12(5) of the Amended Arbitration and Conciliation Act read with Seventh Schedule, the learned Arbitrator in the present case is de jure unable to perform his functions and the mandate of the learned Arbitrator is liable to be terminated inasmuch as the learned Arbitrator is admittedly the President of one of the group companies of the respondent. He is also the authority under the Agreement to verify the claims of the petitioner.

(ii) It is further pleaded that no doubt the arbitration clause was invoked prior to the amendment in the Arbitration and Conciliation Act which was carried out on 23.10.2015, however, the Amended Act would apply. To support his said contention reliance is placed upon judgment of this Court in ***Madhava Hytech-Rani (JV) vs. Ircon International Limited, MANU/DE/3371/2016*** and ***Ratna Infrastructure Projects Private Limited vs. Meja Urja Nigam Private Limited, MANU/DE/0944/2017***. As the

amended provisions apply, it is urged that Section 12 (5) read with Seventh Schedule of the Act would also be applicable to the facts of this case.

(iii) It has also been pointed out that under Clause 10 of the Agreement between the parties, the arbitration proceedings were to be conducted in Gurgaon. However, it is pleaded that by consent of parties this clause stands superseded as is clear from the proceedings before the learned arbitrator dated 09.12.2014. It is also a fact that the learned Arbitrator has carried out more than 40 proceedings and each of the proceedings has been held in Delhi. No proceedings have been held in Gurgaon. Reliance is placed upon the order dated 28.7.2017 where a direction has been made to the petitioners to arrange a venue for the arbitration in South or Central Delhi. In the eventuality the petitioners fail to arrange the venue, the venue was fixed as C-105, Anand Niketan, New Delhi. Hence, he submits that by the consent of parties the venue of arbitration has now shifted to Delhi and the seat of arbitration would be Delhi. He relies upon the judgment of the Supreme Court in *Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited*, (2017) 7 SCC 678 to contend that as the seat of arbitration is Delhi, this Court would have exclusive jurisdiction to adjudicate and supervise the arbitration.

9. Learned counsel appearing for the respondent has opposed the petition by making the following submissions:-

(i) He, firstly, denies that the provisions of the Amended Arbitration Act would apply to the present case. Hence, he submits that Section 12(5) read with the Seventh Schedule of the Act would have no application. He submits that the present petition under Section 14 of the Act is not maintainable.

(ii) He also vehemently argues that this court has no territorial jurisdiction to adjudicate this petition. Reliance is placed on Clause 10 of the Agreement between the parties which specifically provides that the arbitration proceedings shall be concluded in Gurgaon. He also points out that the respondent had moved a petition under Section 9 of the Act before the Additional District Judge, Gurgaon. Hence, in terms of Section 42 of the Act, the courts in Gurgaon would have exclusive jurisdiction to try the present petition. He also relies upon the judgment of the Supreme Court in the case of *State of West Bengal and Others vs. Associated Contractors, (2015) 1 SCC 32* to support his contention that in view of the arbitration Clause and the provisions of Section 42 of the Act, this court would have no territorial jurisdiction and it is only the courts in Gurgaon which are the appropriate courts to deal with this petition.

10. Based on the contentions of the parties, the following issues are raised which require adjudication by this court, namely:-

- (i) Whether this court has territorial jurisdiction to decide this petition?
- (ii) Whether the Arbitration and Conciliation Act, 1996 as amended on 20.3.2015 would apply to the present case?
- (iii) If the answer to issue No.(ii) is that Amendment Act 2015 apply whether the learned Arbitrator is disqualified under Schedule 7 of the Arbitration Act?

11. I will now deal with the above issues.

Whether this court has territorial jurisdiction to decide this petition.

12. I will first deal with the above issue of territorial jurisdiction of this court. Connected to this issue is as to whether Delhi is now the seat of arbitration. As noted above, Clause 10 of the Agreement between the parties

provides that “the proceedings of arbitration shall be in Gurgaon.” It is also a matter of fact that the respondent had before the arbitration proceedings commenced, filed a petition under Section 9 of the Act seeking interim relief before the court of Additional District judge, Gurgaon. The said court vide its order dated 20.10.2016 relying upon the judgment of the Calcutta High Court in the case of *Sh.Tofan Chatterjee vs. Rangan Dhar* in AIR 2016 Cal 213 noted that the Arbitrator has been appointed and proceedings before the Arbitrator have commenced. Hence, the court concluded that the petition under Section 9 would not be maintainable. The petition was disposed of with liberty to the respondent to press all its claims before the learned Arbitrator.

13. The plea of the petitioner is that the parties in view of the consent order of the learned arbitrator dated 09.12.2014 and their conduct thereafter have given a go bye to the stipulation of Clause 10 of the Agreement that the arbitration proceedings shall be in Gurgaon. Learned counsel for the petitioner has also pleaded that more than 40 hearings have taken place in Delhi and not a single proceeding has taken place in Gurgaon. It is pleaded that the seat of Arbitration is now Delhi.

14. The stress of the learned counsel for the respondent was on Section 42 of the Arbitration Act and the judgment of the Supreme Court in *State of West Bengal and Others vs. Associated Contractors (supra)* to plead that this court does not have the territorial jurisdiction even if what was pleaded by the petitioner is correct.

15. Petitioners have placed reliance on the orders passed by the learned Arbitrator. In the hearing dated 09.12.2014 the learned Arbitrator noted as follows:-

“3. In view of this Tribunal proposed to frame the following rules for conducting the present arbitration proceedings between the parties:

1. Fee of the Tribunal is fixed at Rs. 1,00,000/- per sitting which is to be shared equally by both parties.
2. 10% of the above amount shall be payable as secretarial charges for each sitting.
3. Venue of arbitration to be C-105, Anand Niketan, New Delhi till the parties herein mutually decided and agree upon some other venue and the expenses thereof are shared equally.

xxx

4. The claimant party had agreed upon the said proposed rules though, counsel appearing on behalf of the respondents requested a short adjournment for discussing the rules proposed herein and seek instructions from his client.”

16. On the next of hearing, namely, 19.12.2014, the learned Arbitrator noted as follows:

“1. That hearing of the subject case was conducted today i.e. 19.12.2014 at 03:00 PM at C-105, Anand Niketan, New Delhi for a preliminary hearing and to understand the dispute between the parties. Counsels for the parties herein were present.

2. That on the last date of hearing i.e. 09.12.2014 the parties herein had pressed for framing of Rules for conducting the present arbitration proceeding by this Tribunal. In view of which this tribunal had proposed some rules to be framed for conducting the present arbitration proceedings between the parties and a draft copy of the same was handed over to the counsels of both the parties herein.

3. The claimant party had agreed upon the said proposed rules though, counsel appearing on behalf of the respondents had requested a short adjournment for discussing the rules proposed herein and seek instructions from his client. In view of which this

Tribunal has sit again today i.e. on 19.12.2014 at 3:00PM at C-105, Anand Niketan, New Delhi for framing of Rules for conducting the present arbitration proceedings.

4. That the counsel appearing on behalf of the respondent states that he has taken instructions from his client and he has no objection to the rules proposed herein and has agreed upon the same. Though, he has a request that his client feels that the fee of the Arbitrator is a bit on the higher side and it be reconsidered by the arbitrator. Further he states that any reasonable fee fixed by the arbitrator is acceptable to him. Considering his request the fee per sitting of the arbitrator for conducting the present arbitration proceedings is fixed at Rs. 50,000/- (Rupees Fifty Thousand only).

5. That now as agreed upon by the parties herein the rules for conducting the present arbitration proceedings shall be as follows:

.....

3. Venue of arbitration shall be mutually decided. and agreed upon by the parties herein and the expenses thereof to be shared equally.

.....”

17. It clearly follows from the above that as far as the respondent was concerned, before the learned Arbitrator it had on 09.12.2014 agreed to the proposed procedure which stipulate that the venue of the arbitration shall be at C-105, Anand Niketan, New Delhi. However, it was the petitioner who had sought some time to take instructions. Subsequently, on the hearing on 19.12.2014, by the consent of the parties, it was agreed that the venue of the arbitration shall be mutually decided and agreed upon by the parties therein. It is manifest from a reading of these orders that the parties have given a go bye to that part of clause 10 of the Arbitration Agreement which stipulates that the proceedings shall be carried out in Gurgaon. The learned Arbitrator

has incorporated the agreed terms regarding venue of arbitration in his orders. It is also a matter of fact that since 19.12.2014 nearly 40 hearings have taken place all of which have been held in Delhi. I may note that the word venue as used in the consent order passed by the learned arbitrator on 19.12.2014 has reference to the seat of the arbitration.

18. On novation of contract the Supreme Court in ***H.R.Basavaraj (dead) By His LRs. & Anr. vs. Canara Bank & Ors.,(2010) 12 SCC 458*** held as follows:-

“18. Now let us examine Section 62 of the Act which reads as follows:

“62. Effect of novation, rescission and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

This section gives statutory form to the common law principle of novation. The basic principle behind the concept of novation is the substitution of a contract by a new one only through the consent of both the parties to the same. Such consent may be expressed as in written agreements or implied through their actions or conduct. It was defined thus by the House of Lords in *Scarf v. Jardine* [(1882) 7 AC 345 : (1881-85) All ER Rep 651 (HL)] : (AC p. 351)

“... that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract.”

19. Arbitration clause being an agreement between the parties can be altered or modified by consent of the parties. Hence, where in the arbitration agreement the parties have agreed to a particular seat of arbitration, by the

consent the said seat of arbitration can be changed. Reference in this context may be had to the judgment of the Division Bench of the Bombay High Court in *Konkola Copper Mines (PLC) v. Stewarts and Lioyds of India Ltd.*, MANU/MH/0927/2013, where the court held as follows:

“12..... Under sub-section (1), the place of arbitration is a matter in which parties are free to arrive at an agreement. In the absence of an agreement under subsection (1), the arbitral tribunal is entrusted with the jurisdiction to decide the place of arbitration on the basis of the circumstances of the case, including parties' convenience. Sub-section (3) in contrast, begins with a non-obstante provision and provides that unless the parties have otherwise agreed, the arbitral tribunal may meet at any place for consultation among its members, for hearing witnesses, experts or the parties or for inspection of documents, goods or other property. The venue of an arbitration is something which the arbitral tribunal can decide from time to time. For instance, it may be convenient for the arbitral tribunal to meet at one or, for that matter, several venues during the course of arbitral proceedings having regard to the convenience of the witnesses or the parties themselves and having regard to the subject matter of the arbitral proceedings. But, the place of arbitration is that which is agreed upon between the parties under sub-section (1) and failing such an agreement that which is determined by the tribunal under subsection (2) of Section 20. Parties may initially agree to a particular place as a seat of arbitration, but there is nothing in sub-section (1) of Section 20 which prevents them from agreeing subsequently to another place as the seat of arbitration. In the present case, though parties originally contemplated that the place of arbitration would be New Delhi, subsequently they agreed that the place of arbitration shall be Mumbai. In that view of the matter, the first issue before the Court would stand answered by holding that the place of arbitration agreed between the parties, having due regard to the provisions of Section 20(1), was Mumbai.”

20. In the facts of this case in my opinion, in view of the consent of the parties as recorded in the proceedings before the learned arbitrator dated 09.12.2014 and 19.12.2014 and the subsequent conduct of the parties i.e. that the proceedings that have all taken place in Delhi, the original agreement stating that the proceedings be held at Gurgaon have been given a go bye. In view of the agreement/conduct of the parties it is the courts in Delhi which would have jurisdiction. Delhi is now the seat of arbitration.

21. The legal position regarding the seat of arbitration has been explained in detail by the Supreme Court in *Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited (supra)*. The court relied upon the earlier judgment of the Supreme Court in *BALCO v. Kaiser Aluminium Technical Service*, (2012) 9 SCC 552 which quoted with approval the following para from the book “The Law & Practice of International Commercial Arbitration by Redfern & Hunter.”

“10...

“The proceeding discussion has been on the basis that there is only one “place” of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or “seat” of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of arbitration....

13. This court reiterated that once the seat of arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the courts which exercise supervisory powers over the arbitration. ”

22. The court concluded that the moment the seat is designated, it is akin to exclusive jurisdiction clause. As noted above, the seat of arbitration can be stated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way.

23. It is no doubt true that before the commencement of arbitration, the respondent had filed a petition under Section 9 of the Act before the Additional District Judge, Gurgaon. I may see the effect of this petition filed before the concerned courts in Gurgaon in view of Section 42 of the Act.

24. Section 42 of the Arbitration Act reads as follows:-

“42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

25. The supreme Court in *State of West Bengal and Others vs. Associated Contractors (supra)* had noted the legal position as follows:-

“25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part-I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an Award is pronounced under Part-I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part-I if they are made to a court as defined. Since applications made Under Section 8 are made to judicial authorities and since applications Under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an Arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil court having original jurisdiction in the district as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part-I.

(g) If a first application is made to a court which is neither a Principal Court of original jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject matter jurisdiction would be outside Section 42.

The reference is answered accordingly.”

26. Hence, an exception was noted, namely, where the application was preferred to a court which is not the Principal Civil Court of original jurisdiction in a district, etc., the court noted as follows:-

“24. If an application were to be preferred to a Court which is not a Principal Civil Court of original jurisdiction in a district, or a High Court exercising original jurisdiction to decide questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, then obviously such application would be outside the four corners of Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject matter jurisdiction, such application would be outside Section 42 and would not debar subsequent applications from being filed in a court other than such court.”

27. It would follow that where the court is not the appropriate court to adjudicate upon the matter as stated in Section 2(1)(e) of the Arbitration Act then in that eventuality such an application would be outside the scope of Section 42 and would not debar subsequent application being filed in a court other than such a court.

28. Reference may also be had in this context to the judgment of this court in *Devas Multimedia Pvt. Ltd. v. Antrix Corporation Ltd.*, 238 (2017) DLT 103 where this court noted with approval of the judgment of the Madras High Court as follows:

“31. Here, the decisions of some the High Courts require to be referred to as well. In *Surya Pharmaceuticals v. First Leasing Company of India* (supra) the Madras High Court observed:

7.1 The jurisdiction as referred to under Section 42 of the Arbitration and Conciliation Act, 1996, would only mean that the Court which entertain[s] the first application must have jurisdiction. In other words, Section 42 of the Act cannot be invoked unless the party, who raises the plea of jurisdiction demonstrate[s] that the Court which entertained the first application has got the jurisdiction.

7.2 The further fact that the arbitration agreement has been entered into between the parties, is not in dispute. Mere filing of an application before a Court by itself will not oust the jurisdiction. In other words, by merely filing an application before any Court, the bar under Section 42 cannot be extended, when another application is filed by a party before another Court, which has got jurisdiction. Therefore, a party, who raises the plea of lack of jurisdiction, will have to establish the fact that the Court, which entertains the first application at the earliest point of time, has got jurisdiction...

The object and intent enshrined in the Arbitration and Conciliation Act, 1996, is to avoid multiplicity of proceedings and the Forum shopping at the instance of one of the parties to an arbitral agreement. It can only be applied when the first application filed is before a Court of competent jurisdiction and thereafter, the second application is filed by either of parties to avoid the jurisdiction of the Court, which entertain the said earlier application. (emphasis supplied)”

29. In the present case, the petition under Section 9 had been filed before District Court Gurgaon on 26.08.2014 prior to the learned Arbitrator entering into reference and prior to change of seat of arbitration as evidenced subsequently vide consent orders dated 09.12.2014 and 19.12.2014 of the learned arbitrator. The petition was disposed of in view of the fact that the learned Arbitrator had been appointed and arbitration proceedings had commenced granting liberty to the respondent to press all its claims before the learned Arbitrator. Subsequent to the learned Arbitrator entering into reference, parties by consent have modified the seat of arbitration. From the seat being in Gurgaon, it has been modified now to Delhi. Hence, Delhi courts would have exclusive jurisdiction. Hence, Section 42 of the

Arbitration Act would have no application to this case and does not oust the jurisdiction of this court to adjudicate upon the present petition.

30. I hold accordingly.

Whether the Arbitration & Conciliation Act, 1996 as amended on 23.10.2015 would apply to the present case.

31. The next issue that arises in this case is as to whether the new amendments to the Arbitration Act which were introduced on 23.10.2015 would have application to the present case. It is only if the amendments to the Arbitration Act apply that the provisions of section 12(5) of the Act read with the 7th Schedule would be applicable to this case. As noted above, Clause 10 of the Agreement between the parties specifically states that the provisions of the “Arbitration and Conciliation Act, 1996 as amended up to date” would apply.

32. This Court in ***Madhava Hytech-Rani(JV) vs. Ircon International Limited (supra)*** was dealing with the following arbitration clause:-

“72.0 Settlement of disputes

.....

72.2.5 The Conciliation and/or Arbitration proceedings shall be governed by the provisions of the Indian Arbitration and Conciliation Act 1996 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the conciliation and arbitration proceedings under this clause.”

Based on the said clause this court held as follows:-

“11. The next issue to be addressed is whether the amendments introduced by the Amendment Act would be applicable in this case. Admittedly, the arbitration clause was invoked by Madhava prior to 23.10.2015 - the date on which the Amendment Act came into force; therefore, by

virtue of Section 26 of the Amendment Act, the amendments to the Act would not be applicable to the arbitral proceedings in this case, unless the parties had agreed otherwise. Section 26 of the Amendment Act is relevant and is set out below:-

"26. Act not to apply to pending arbitral proceedings. - Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

12. Having stated the above, it is relevant to observe that in the present case, the parties had specifically agreed that the arbitration proceedings would be governed by the Act or any statutory modification or any reenactment thereof. Thus, the present case falls within the exception as provided under Section 26 of the Amendment Act as the parties have expressly agreed that any statutory modification to the Act would be applicable. Therefore, the Amendment Act would apply to the arbitral proceedings in this case."

33. Similarly, in *Ratna Infrastructure Projects Private Limited vs. Meja Urja Nigam Private Limited(supra)* this court was dealing with an arbitration clause, namely, Clause 56 relevant portion of which reads as follows:-

"Subject as aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration under this clause."

In para 22, this Court held as follows:-

“22. The Court is unable to accept the submission on behalf of the Respondent that in terms of the wordings of Clause 56 of the GCC as amended the parties have to hereafter again agree that the Act as amended with effect from 23rd October 2015 would apply to them. The words “any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration...” satisfies the requirement of Section 26 of there being an agreement between the parties that the Act as amended with effect from 23rd October 2015 will apply. The Court is not prepared to draw the fine distinction between ‘agree’ and ‘agreed’. Once the amendment to the clause clearly stated that all statutory modifications and re-enactments would apply, then there is no need for further agreement in that respect after 23rd October 2015. The plea of the Respondent in this regard is rejected.”

34. In the present case, the arbitration clause, namely, Clause 10 specifically provides that the “Arbitration and Conciliation Act as amended up to date” would be applicable. In view of the judgments of this court in the above matters, namely, *Madhava Hytech-Rani (JV) vs. Ircon International Limited (supra)* and *Ratna Infrastrucutre Projects Private Limited vs. Meja Urja Nigam Private Limited (supra)* it would follow that the exception to Section 26 of the Amended Act would be applicable to the facts of this case inasmuch as the parties have agreed that the Amended Act would be applicable. Hence, Section 12(5) read with Seventh Schedule of the Arbitration Act would be applicable to the parties in the present case.

Whether the learned arbitrator is disqualified under the amended Arbitration Act.

35. I will now deal with the next contention of the petitioner that in view of Section 12(5) read with Seventh Schedule of the Amended Act, the learned Arbitrator is de jure disqualified. The relevant provisions of the Arbitration Act reads as follows:-

“12. Grounds for challenge.—

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

.....

(2)

(3)

(4)A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

14. Failure or impossibility to act.—(1) [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if]

(a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.”

36. The factual position of the Arbitrator and his association with the respondent is not much in doubt. On 20.11.2014, the learned Arbitrator had dismissed the application under Section 12(3) of the Act filed by the petitioner. While dismissing the said application, the learned Arbitrator noted as follows:-

“It is also important to mention here that since beginning I as being the President in the group company claimant company is looking into the Corporate Affairs of the company wherein I was not involved in the daily affairs of the individual company at all and I was at not, at any point of time attached or supervising the dealings happening between the respondents and the claimant company, in terms of the MOA dated 20.10.2010.

I also find substantial stance in the argument raised by the counsel for the claimant that merely possessing of a position by the arbitrator with the group company of the claimant company does not justify the doubts of the respondents on the arbitrator.

In view of this I am inclined to dismiss the present application filed by the respondents and do not propose to withdraw myself from holding the present proceedings as a sole arbitrator nor the other

party (Claimant) has agreed to the respondents challenge. Therefore, the challenge is herewith quashed” (sic)

It is manifest from a reading of the above order of the learned Arbitrator that he is the president in the Group of Companies of the respondent and is looking after the corporate affairs of the respondent and its group companies.

37. There is another aspect which shows the relationship of the respondent with the learned arbitrator. Reference may be had to the clause 8(c) of the Memorandum of Agreement dated 10.11.2010 which reads as follows:

“8(c). Only in case, the Second Party decides, not to go ahead with acquisition of approx. 70 acres Land (shaded area of the land in Annexure ‘A’) post signing of this MoA, the Second Party would refund double the expenses incurred by the First Party upon production of proper receipts and verified by Mr.Puneet Saran.”

Hence, it is clear that the above clause of the agreement provides that in case the respondent decides not to go ahead with the acquisition of land, the respondent was to refund double the expenses to the petitioner upon production of proper receipts which were to be verified by Mr.Puneet Saran, (the learned arbitrator). It is quite clear that Mr.Puneet Saran, the learned arbitrator is a man who holds a responsible position with the respondent company and hence has been entrusted the task of having to verify receipts of the petitioner in the eventuality as stipulated in clause 8(c) of the agreement. He is an employee/advisor of the respondent company as he is entrusted with the task to verify the bills/claims of the petitioner in the stated circumstances.

38. Items 5 and 12 of the Seventh Schedule of the Arbitration Act read as follows:-

“Arbitrator’s relationship with the parties or counsel

xxx

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

xxx

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.”

39. In this case, as I have noted above the Amended Arbitration Act is applicable. Clearly, Items 5 and 12 of the Seventh Schedule of the Arbitration Act would get attracted here inasmuch as the learned Arbitrator is a part of the management team of the respondent Company and has a controlling influence on the respondent Company. Hence, the learned Arbitrator in terms of Section 12(5) of the Act is ineligible to be appointed as the Arbitrator.

40. In fact, the Supreme Court even prior to the 2015 amendment, under the arbitration act had noted that for private companies the Directors and such like officers appointment of such persons can give rise to a valid and reasonable apprehension of bias. Reference may be had to the judgment of Supreme Court in *Indian Oil Corporation Vs Raja Transport Private*

Limited (2009) 8 SCC 520 where the Supreme Court in para 36 held as follows:

“36. The position may be different where the person named as the arbitrator is an employee of a company or body or individual other than the State and its instrumentalities. For example, if the Director of a private company (which is a party to the arbitration agreement), is named as the arbitrator, there may be a valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person.”

41. Regarding the powers of the court under Section 14 of the Arbitration Act, reference may be had to the judgment of the Supreme Court in the case of **HRD Corporation vs. GAIL India Ltd., 2017 SCC OnLine SC 1024** wherein the Supreme Court noted as follows:-

“13. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, Under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal Under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed Under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a

challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal Under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings Under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the Appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.”

42. The Court further held as follows:-

“17. It will be noticed that Items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only reason that these items also appear in the Fifth Schedule is for purposes of disclosure by the arbitrator, as unless the proposed arbitrator discloses in writing his involvement in terms of Items 1 to 34 of the Fifth Schedule, such disclosure would be lacking, in which case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only. It is for this reason that it appears that Items 1 to 19 also appear in the Fifth Schedule.”

43. The Supreme Court also noted its earlier judgment in *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.*, (2017) 4 SCC 665 where the Supreme Court had noted as follows:-

“20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in *Hashwani v. Jivraj* [Hashwani v. Jivraj, MANU/UKSC/0041/2011 : (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words: (WLR p. 1889, para 45)

45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.”

xxx

25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds

which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of Sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the Respondent are not covered by any of the items in the said list.”

44. This court has also dealt with the powers of the court under Section 14 of the Arbitration Act in ***West Haryana Highways Projects Pvt. Ltd. vs. National Highways Authority of India, [2017 (242) DLT 44]***. This court noted as follows:-

“24. In the light of the said legal position it becomes quite clear that under Section 12(5), if a person’s relationship with the parties or counsel or subject matter of dispute falls in any of the categories specified in the Seventh Schedule, the said person is ineligible to be appointed as an arbitrator. If a party persists in nominating any such person as an arbitrator, it would be a completely futile and waste of efforts to permit the Tribunal to continue to adjudicate the matter and permit a challenge after completion of the arbitration, under Section 34 of the Act. If an arbitrator is appointed contrary to Section 12(5) read with the Seventh Schedule, he is *de jure* ineligible to perform his functions and the mandate of such an arbitrator can be terminated by the court under Section 14(2) of the Act. Section 13(3) and 13(5) would have no application in such circumstances.”

Clearly the learned arbitrator in the facts is ineligible to act an arbitrator and his mandate is liable to terminated.

45. Hence, in the present case, in view of the statutory provisions as noted above, namely, Section 12(5) read with Seventh Schedule of the Act, the learned Arbitrator is de jure disqualified from continuing to be the Arbitrator. I terminate the mandate of the learned Arbitrator.

46. Parties are referred to arbitration by the Delhi International Arbitration Centre. The Centre will nominate a retired Judge of High Court from its panel to act as a Sole Arbitrator. The previous learned arbitrator will hand over the records to DIAC. The pleadings and the documents filed by the parties would be part of the arbitration record before DIAC.

47. The petition stands allowed as above.

(JAYANT NATH)
JUDGE

MAY 18, 2018/n/rb